EXHIBIT A.

IN THE

SUPREME COURT OF ALABAMA.

OCTOBER TERM 1966-67.

FIRST DIVISION NO. 431.

DUNBAR STANLEY STUDIOS, INC.,
Appellant,

vs.

CITY OF MOBILE, a Municipal Corporation,
Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

WILLIAM H. BRIGHAM,
Assistant City Attorney,
802 Van Antwerp Building,
Mobile, Alabama,
FRED G. COLLINS,
City Attorney,
958 Dauphin Street,
Mobile, Alabama,
Attorneys for Appellee.

PROPOSITIONS OF LAW.

Proposition of Law No. 1.

Bill for Declaratory Decree is subject to demurrer for failure to show that complainant has a justiciable interest in the subject matter.

Shadix v. City of Birmingham, 251 Ala. 610, 38 So. 2d 851 (1949);
American Federation of State C & M Emp. v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958);
Southern Railway Company v. Curry, 239 Ala. 263, 194 So. 523;
Town of Warrior v. Blaylock, 275 Ala. 113, 152 So. 2d 661 (1963);
Werneth v. Hanly, 262 Ala. 219, 78 So. 2d 299, 302 (1955);
Birmingham Trust National Bank v. Garth, 263 Ala. 121, 81 So. 2d 590 (1955);
Curjel v. Ash, 261 Ala. 42, 72 So. 2d 732 (1954).

Proposition of Law No. 2.

There is no justiciable controversy in the present case, because the Court will not make a declaration in a declaratory judgment proceeding which will be futile.

Homan v. Beard, 268 Ala. 22, 104 So. 2d 914 (1958);
City of Mobile v. Scott, 278 Ala. 388, 178 So. 2d 545 (1965).

Proposition of Law No. 3.

In an action for declaratory judgment, the presence of necessary parties is jurisdictional, and the Court will not maintain and render decrees where the questions pre-

sented cannot be adjudicated for want of necessary parties.

Holland v. Flynn, 239 Ala. 390, 195 So. 265 (1940);

City of Mobile v. Gulf Development Company, 277 Ala. 431, 171 So. 2d 247 (1965);

Alabama Farm Bureau, Mut. Cas. Ins. Co. v. Crestman, 277 Ala. 410, 171 So. 2d 119 (1965);

Title 7, Section 166, Code of Alabama, 1940 (Recompiled 1958);

Title 7, Section 128, Code of Alabama, 1940 (Recompiled 1958).

ARGUMENT.

* * * * * * *

Proposition of Law No. 1.

A bill for declaratory decree is subject to demurrer for failure to show that complainant has a justiciable interest in the subject matter. Directly concerning this proposition, this Court has stated in **Shadix v. City of Birmingham**, 251 Ala. 610, 38 So. 2d 851 (1949), as follows:

> "The rule prevailing in this jurisdiction, as well as elsewhere, is that **there must be a bona fide existing controversy of a justiciable character to confer upon the court jurisdiction to grant declaratory relief** under declaratory judgment statutes. Jefferson County v. Johnston, 232 Ala. 406, 168 So. 450; Hawkins v. Jefferson County, 233 Ala. 49, 169 So. 720; Bagwell v. Woodward Iron Co., 236 Ala. 668, 184 So. 692; Theater Co. v. Manning, 236 Ala. 670, 185 So. 171; Saenger Theaters Corp. v. McDermott, 237 Ala. 489, 187 So. 460; Bates v. Baumhauer, 239 Ala. 255, 194 So. 520; Bullock County v. Sherlock, 242 Ala. 262, 5 So. 2d 800.
>
> **It is not sufficient to plead by way of conclusion that there is an existing controversy of a justiciable character between the parties. Facts must be pleaded out of which the controversy arises.** City of Cherryvale v. Wilson, 153 Kan. 505, 112 P. 2d 111; Anderson v. Wyoming Development Co., 60 Wyo. 417, 154 P. 2d 318.
>
> Although ordinances are expressly declared to be proper subjects of declaratory relief, yet a declaratory judgment may not be rendered in respect to them in disregard of the statutory limitations upon the granting of such relief . . .
>
> * * * * * * *

The declaratory judgment statutes do not empower Courts to decide moot questions, abstract propositions or to give advisory opinions, however convenient it might be to have the questions decided for the government of future cases (Cases cited). While there may be a difference of opinion as to the validity of the ordinance in question, there is no present clash of contending rights.

Our judgment is that the averments of the petition fall far short of presenting an actual bona fide justiciable controversy between the parties. The demurrer to the petition was well taken and was properly sustained." (Emphasis added.)

This Court, in **Shadix**, supra, after setting out the petition which was designed to show a justiciable controversy stated "we are of the opinion that the averments of the petition are totally insufficient to justify resort to litigation looking to a declaratory judgment. **The facts do not show any present controversy between the petitioner and the City of Birmingham.**" (Emphasis added.) THAT IS THE EXACT VIEW OF THE TRIAL COURT IN OUR CASE.

It is abundantly clear from the Bill of Complaint, both before and after amendment, that the City of Mobile cited a company by the name of J. C. Penney Company, a local retailer, to pay a privilege license according to the provisions of the City License Code (Tr. 1, Para. 4) (Tr. 8, Exhibit B).

While there are also to be found in the bill of complaint and the bill of complaint as amended, conclusionary statements to the effect that the license requirements applied only to the activities of the complainant, there is not to be found a single fact pleaded, as required in **Shadix**, supra, out of which the controversy supposedly arises with the City of Mobile. This court has dealt directly with

this type of conclusionary allegation in American Federation of State, C & M Emp. v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958), where this court stated:

> "Without specifying the facts amounting to a controversy, this Court cannot proceed to declare a justiciable controversy upon a bare showing in a complaint of mere apprehension, anticipation, or fear of unauthorized, illegal, or unconstitutional acts, by public officers to be committed in future. O'Rear v. Sartain, 193 Ala. 275, 69 So. 554; Alston v. Dunn, 176 Ala. 421, 58 So. 300; Goodson v. Dean, 173 Ala. 301, 55 So. 1010."

Even if the privilege license levied on J. C. Penney Company is unconstitutional and invalid, what party in the instant action can question the validity?

There is not an allegation to be found in the complaint or the complaint as amended, that J. C. Penney Company is contending that they ought not to pay the privilege license, therefore, there is no allegation of a justiciable controversy between the parties to this suit, or even between those that are parties to this suit and those that are not parties to this suit.

For the sake of the instant case, and argument, we could submit that all the plaintiff's activities are in interstate commerce, and there would still be no justiciable controversy between the parties to this suit.

For aught that appears in the bill of complaint, J. C. Penney Company may be willingly paying the privilege license shown by the bill of complaint to have been levied upon it. Can the "interstate trader" object to that, because of a contract such as alleged, between private parties, concerning operations inside J. C. Penney Company's store?

Can it be contended that a local retailer may contract for another, possibly a supplier entirely in interstate

trade, to pay the local retailer's taxes or licenses and thereby, ipso facto, make the tax or license, because of a third party contract, a tax on the third party and consequently subject to the various ramifications of taxation applicable only to the third party and not to the local retailer? Is the City's legislative power to be bound by a court to the terms of a contract entered into by a city retailer and a third party? Certainly not! Not even if the third party and the City retailer were both parties, much less where the City retailer is left out entirely as a party, once the third party has a contract signed and is operating some segment of the retailer's instore operation. For aught that appears, J. C. Penney Company understands that this could not be reasonably contended, and does not care to tilt at windmills.

It is difficult to imagine a privilege license that could not fall before the restriction on burdening interstate commerce if each local retailer, by a contract with an interstate supplier to pay the retailer's privilege taxes, could bind the City to whatever restrictions on taxation can be shown to apply to the interstate supplier.

Previously in the deliberations of this Court on declaratory judgments, a similar bill for declaratory judgment was considered in **Southern Railway Company v. Curry**, 239 Ala. 263, 194 So. 523. In the **Southern** case, the Railway Company brought a bill for declaratory judgment against members of the State Tax Commission to determine whether a sale of slag in carload lots was subject to the provisions of the retail sales tax. The seller of the slag, Woodstock Slag Corporation, was not a party to the bill, and had apparently willingly paid the sales tax. This Court disposed of the supposed issue of whether the slag was or was not a "building material" as follows:

> "But whether it is or not, the seller seems to be making no complaint, and the purchaser not being

the taxpayer, eo nomine, **is no position to have that question determined for the person against whom the tax is levied,** and a judgment, assuming that the Court had jurisdiction to render same, declaratory or otherwise, as between the Railway Company, and the State or its taxing authorities would be without binding force as between the State and its authorities and the Woodstock Slag Corporation. Section 6, Declaratory Act, Gen. Acts, 1935, P. 778. See also, State Tax Commission et al. v. Commercial Realty Company, 236 Ala. 358, 182 So. 31.

The facts alleged in the bill do not show a justiciable controversy and are not sufficient to give it equity.

The averments of a bill to warrant relief must be so complete that on their admission or on decree pro confesso the Court can without evidence say that the complainant is entitled to the relief prayed (Cases cited)." (Emphasis added.)

The trial court in the instant case could see no equity in the bill where, if all the relief prayed for were granted, there would be no judgment of binding force as between the City and J. C. Penney Company, the licensed retailer in this case.

The various other recent cases cited under Proposition 1 show instances of demurrers to bill for declaratory judgments held good because of failure of the bill to show an actual controversy as to a justiciable question. We will not burden the Court with a review of the facts for the holding of each. There are numerous others so holding.

Applying the above argument to the complaint, and the complaint as amended, it is obvious that the bill of complaint, and the bill of complaint as amended, was demurrable. The first ground of the Appellee's demurrer (Tr. 14, Tr. 21) as well as the numerous other grounds

therein are addressed directly to this point. There was no error in sustaining Appellee's demurrer to the Appellant's complaint as amended, and to the original bill of complaint.

Proposition of Law No. 2

There is no justiciable controversy in the instant case, because this Court will not make a declaration in a declaratory judgment proceeding which will be futile. An election which occurred pending the decision in **Homan v. Beard**, 268 Ala. 222, 104 So. 2d 914 (1958), and a release from employment in **City of Mobile v. Scott**, 278 Ala. 388, 178 So. 2d 545 (1965), were the basis for this Court stating that there was no justiciable controversy, since it would be futile to make a declaration. The argument under Proposition of Law No. 1 applies fully as well under Proposition of Law No. 2, to show the futility of any declaration in the instant case. Without a possibility of making a judgment binding on the only party alleged to have been cited to meet the requirements of the privilege license involved, a declaration of this Court would be futile.

Proposition of Law No. 3.

In **Holland v. Flynn**, 239 Ala. 390, 195 So. 265 (1940), this Court stated:

> "We deem it our duty to determine whether the Court below acquired jurisdiction to adjudicate the question of title—to make any effective declaration."

In the **Holland** case, where the parties to the suit did not raise the question of absent necessary parties, this Court continued as follows:

> "The Declaratory Judgment Acts (now Title 7, Section 166), required necessary parties to be brought

in. Regardless of this statute, the presence of necessary parties is jurisdictional."

"No matter what may be the wishes of the parties in Court, the Courts will not entertain and render decrees, which, for want of necessary parties, cannot adjudicate the questions presented. This rule has been declared by many courts in cases under the Declaratory Judgment Law. Authorities Cited."

The Section referred to, now Title 7, Section 166, Code of Alabama, 1940 (Recompiled 1958), is as follows:

Section 166—Parties when declaratory relief is sought.—All persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard (1935, p. 777).

In the instant case this cited section would be applied in conjunction with Title 7,

Section 161—When Refusal Proper.—The Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy, giving rise to the proceeding (1935, p. 777).

This Court has repeatedly ruled that even where no specific ground of demurrer used the phrase "necessary party" or "indispensable party", a declaratory judgment would not be rendered where the above statutes and

equities of the case had not been complied with in the averments of the bill.

In **City of Mobile v. Gulf Development Company**, 277 Ala. 431, 171 So. 2d 247 (1965) this Court held that the cause must be reversed for want of necessary parties, although in the action the demurrer of the respondents did not raise this particular issue as to the property owners involved. This Court set out the following principles:

> "The general rule in a court of equity is that all persons having a material interest, legal or equitable, in the subject matter of a suit, must be made parties, either as plaintiffs or defendants. The rule proceeds on the principle that no man's rights should be controverted in a court of justice unless he has full opportunity to appear and vindicate them; and further, that complete justice may be done and future litigation avoided, the performance of the decree being safe, because of the presence in court of all parties who have an interest in its subject matter. The general rule further is that if a bill is defective for the want of proper parties, advantage should be taken of the defect by plea, demurrer, or answer, and if not so taken, the objection is waived. The rule is subject to the exception that if a cause cannot be properly disposed of, on the merits, without the presence of the absent parties, the objection may be taken by the Court ex mero motu. Prout v. Hoge, 57 Ala. 28. See also: Batre v. Auze's Heirs, 5 Ala. 173; McMaken v. McMaken, 18 Ala. 576; Woodward v. Wood, 19 Ala. 213; McCully v. Chapman, 58 Ala. 325; Watson v. Oates, 58 Ala. 647; Amann v. Burke, 237 Ala. 380, 186 So. 769; Matthews v. Matthews, 247 Ala. 472, 25 So. 2d 259; Garrison v. Kelly, 257 Ala. 105, 57 So. 2d 345." Rollan v. Posey, 271 Ala. 640, 645, 126 So. 2d 464, 468.

"The Declaratory Judgment Act, Michie's Sup. Code, § 7811 (11) required necessary parties to be brought in. Regardless of this statute the presence of necessary parties is jurisdictional.

"No matter what may be the wishes of the parties in court the courts will not entertain and render decrees, which, for want of necessary parties, cannot adjudicate the questions presented. This rule has been declared by many courts in cases under the Declaratory Judgment Law. (Authorities Cited), Holland v. Flinn, 239 Ala. 390, 392, 195 So. 256."

See also, for example, **American Farm Bureau v. Crestman**, 277 Ala. 410, 171 So. 2d 119 (1965), reversed for want of necessary party, on the same identical principles, though the issue was never raised in the lower Court in any manner.

Applying the above argument to the bill of complaint, and to the bill of complaint, as amended, it is obvious that both are demurrable. The question presented, concerning the validity of the license levied upon J. C. Penney Company, cannot be adjudicated without the presence of J. C. Penney Company, a stranger to the suit. This Court has taken upon itself the duty of determining this issue in declaratory judgment actions; the instant case is a specific example of when such action is a necessity. There was no error in sustaining the Appellee's demurrer to the Appellant's Bill of Complaint as amended, and to the Appellant's Bill of Complaint as originally filed. Nor was there error in rendering a final decree dismissing the Bill of Complaint as amended. There is no error in the record.

Respectfully submitted,

WILLIAM H. BRIGHAM,
Attorney for Appellee.